***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

74-1702



IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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NO. 74-1702

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ELENA CLASS, ET AL

PLAINTIFF-APPELLEES

V.

NICHOLAS NORTON, ET AL

DEFENDANT-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF CONNECTICUT

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# REPLY BRIEF OF DEFENDANT-APPELLANT TO BRIEF OF AMICUS CURIAE

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## PRELIMINARY STATEMENT

The defendants-appellants in this action were granted permission by the Court at oral argument on Monday, September 9, 1974, to file a reply brief to be submitted by Friday, September 13, 1974, at 12 noon, to the brief submitted by the Lawyers' Committee For Civil Rights Under Law, of Washington, D. C., as amicus curiae.

In the brief of amicus, it is stated in the Introduction thereto, at pp. 2-3, that:

> "In 1972, the district court found that defendants were in violation of federal law and of the fourteenth amendment, and ordered the defendants to take steps to end the violations." [emphasis added]

The defendant-Commissioner believes it is inaccurate to state that the district court found him to be in violation of the fourteenth amendment. It is true that by Memorandum of Decision entered on June 16, 1972 [R.9,p.3] the district court found that the defendant-Commissioner was out of compliance with 45 C.F.R. Section 206.10(a)(3) in that he had failed in a substantial number of cases, to process AFDC applications within the required thirty-day period. The district court also found that the method by which the defendant determined that the date upon which payment of welfare benefits would

become effective was contrary to the HEW regulation contained in 45 C.F.R. Section 233.20(a)(1). The court, in its opinion, also recited that this method of determining the date from which payment of benefits would be effective resulted in different treatment of AFDC recipients and thereby resulted in a denial of equal protection. However, since under 28 U.S.C. Section 2281-2284, a three-judge federal court would be required to pass upon the constitutionality of a state regulation, the defendant-Commissioner believes that this language of the district court referring to a denial of equal protection must be regarded solely as dicta.[1]

It is important to point out therefore, that the defendant-Commissioner of Welfare was not found to be violating plaintiffs right to equal protection under the fourteenth amendment. He was found to be in violation of the two HEW regulations referred to supra, only.

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[1] Since the issue was decided on the "statutory" question, it would have been unnecessary, even for a three-judge court, to decide the constitutional issue.

I. Recent Cases Interpreting Edelman On The Question Of Attorneys' Fees

The brief of amicus states that before the Supreme Court's decision in Edelman, several courts had held that attorneys' fees can be awarded against state officials sued in their official capacity, and, notably, that the Supreme Court in one case had affirmed such an award. That was the case of Sims v. Amos, 340 F. Supp. 691 (MD Ala. 1972).

In the case of Jordan v. Gilligan, 42 U.S.L.W. 2590 (April 25, 1974), the Court of Appeals for the Sixth Circuit held that the Eleventh Amendment is a bar to a federal district court's awarding of attorneys' fees against a state or its officials acting in their official capacity in a suit brought under 42 U.S.C. Section 1983.

In arriving at that decision the Sixth Circuit, in its original opinion, supra, stated that Sims v. Amos, supra, was reported in two separate segments at the district court level, and that only the segment contained in 336 F. Supp. 924 (which did not contain the decision involving the claim for attorneys' fees) was affirmed by the Supreme Court. Thus the Sixth Circuit had held in its original decision that the Supreme Court had not affirmed the award of attorneys' fees.

It was subsequently discovered that both segments of Sims (336 F. Supp. 924, and 340 F. Supp. 691) had been included in

the Supreme Court's affirmance in 409 U.S. 942 (1972).

The Court of Appeals for the Sixth Circuit thereupon granted a re-hearing in Jordan v. Gilligan, supra. That decision is reported in 43 U.S.L.W. 2058 (August 13, 1974).

In that decision, the Sixth Circuit has reached the same conclusion as it did originally, and has held that the Eleventh Amendment bars an award of attorneys' fees against an unconsenting state or state official acting in his official capacity.

The Sixth Circuit stated in that opinion that:

> "Supreme Court decisions rendered by written opinions are binding on all courts; however, a summary affirmance without opinion in a case within the Supreme Court's obligatory appellate jurisdiction, such as Sims, has very little precedential significance...[A]ccordingly, the Court's summary affirmance of Sims v. Amos is not controlling precedent on the Eleventh Amendment question presented here."

The Court of Appeals, at the conclusion of its opinion, stated:

> "Careful study of the Edelman opinion leads this court to conclude, as did the Third Circuit [in Skehan v. Board of Trustees, CA 3, 1974], that

the Eleventh Amendment prohibits an award of attorneys' fees against a state that has not waived its sovereign immunity."

In Skehan v. Board of Trustees, F.2d (No.73-1613, 3d Cir., 1974), the Third Circuit said [slip opinion, p.17]:

"...Thus if under Pennsylvania law the College is an agent of the Commonwealth, state sovereign immunity would preclude the award of any relief against it directly and any but prospective monetary relief, equitable or legal, in an order directed against the individual defendants. Edelman, while not ruling on the matter specifically, appears to bar the award of attorneys' fees from the state treasury as well."

Thereupon, the Court cites the following extensive footnote:

"7. The contention could be made that, by failing to expressly overrule its summary affirmance in Sims v. Amos, 409 U.S. 942 (1972), aff'g 336 F. Supp. 924 (M.D. Ala. 1972) (3-judge court) of an award of attorneys' fees against state officers which was to be satisfied from the state treasury, the Court meant to leave the issue open. See Gates v. Collier,

489 F.2d 298 (5th Cir. 1973) following Sims and quoting the jurisdictional statement raising the eleventh amendment issue before the Court. Such a conclusion would, however, be inconsistent with the Edelman Court's rationale. We attribute the Court's omission to inadvertence. For a listing of other decisions overruled, see note 6 supra.

Skehan, pointing to language in Justice Marshall's dissent in Edelman v. Jordan, supra, contends that the liability of the Commonwealth for retroactive benefits in his case is still open. Justice Marshall wrote:

> "It should be noted that there has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an amicus in this case. In

> view of my conclusion that any sovereign immunity which may exist has been waived, I also need not reach this issue."
> 42 U.S.L.W. at 4432 n.2.

An appreciation of this cryptic comment requires some refined analysis of the issues dealt with in Justice Rehnquist's majority opinion. Claims for money against a state can arise in three separate legal frameworks. First, the claim may be based upon state law, purely and simply; breach of contract, for example. Second, it may be based upon federal law made binding upon the states by virtue of the supremacy clause; nonpayment of benefits mandated by the Social Security Act, for example. Third, it may be based upon the fourteenth amendment, which binds the states directly and under Section 5 of which Congress has the power to create remedies. Edelman involves retroactive welfare benefits withheld in violation of the Social Security Act, and thus falls in the second legal framework. A fourteenth amendment claim provided a basis for federal jurisdiction, but was not decided. See Hagans v. Lavine, 42 U.S.L.W. 4381 (U.S. March 25, 1974). Thus Justice Marshall is technically correct that Edelman does not dispose of the third category.

But the majority opinion expressly overrules Shapiro v. Thompson, supra, State Department of Health and Rehabilitative Services v. Zarate, supra, and Wyman v. Bowens, supra, all fourteenth amendment cases. We think Edelman must be read as closing the door on any money award from a state treasury in any category."

In Named Individual Members v. Texas Highway Department, 496 F.2d 1017 (5th Cir. 1974), the plaintiffs, individual members of the San Antonio Conservation Society, sought to enjoin the Texas Highway Department acting through the Texas Highway Commission, consisting of individual members termed "state defendants" and others from construction of an expressway which would pass through parklands.

The Court of Appeals for the Fifth Circuit held, inter alia, at 496 F.2d 1026:

"The state defendants respond that sovereign immunity of the State of Texas by virtue of the Eleventh Amendment to the Constitution has also immunized them from an award of attorneys' fees. The recent case of Edelman v. Jordan, U.S. , 94 S.Ct. 1347, 39 L.Ed.2d 662, decided by the Supreme Court on March 25, 1974, is cited by the state defendants in support of this contention. It is apparent that any award for attorneys' fees

must be paid from the general revenues of the State of Texas. Under the Edelman rationale the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." [footnote omitted] Edelman, supra, U.S. at ,94 S.Ct. at 1356. Cases in which attorneys' fees were awarded because of bad faith or obdurate obstinacy, or under the private attorney general theory against non-state defendants, are clearly inapposite. The claim for attorneys' fees, even if limited to services through the first appeal of this case, is, therefore, barred."

In an opinion, concurring in part and dissenting in part, Circuit Judge Tuttle said:

"While I concur fully with the opinion with respect to the claim on the merits, I respectfully dissent with respect to the disposition of the issue of attorneys' fees. Since the trial court did not enter any order with respect to the claim for attorneys' fees, I would remand that issue to the trial court to enable it to determine first the extent to which any award might be a charge

against state revenues as distinguished from being merely a charge against the individual named defendants."

The brief of amicus points out that Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974) contains dicta which seems to doubt the applicability of the eleventh amendment prohibition of Edelman to the award of attorneys' fees against a state. Defendant-Commissioner has already pointed out that the Fusari case is readily distinguishable from Edelman in that the court (1) found a waiver of the State's eleventh amendment immunity and (2) that the attorneys' fees awarded in that case were to come from a percentage of the plaintiffs recovery of unemployment benefits, and not from the state treasury.

II. Amicus' Brief Has Misinterpreted The "Ancillary Effect" Mentioned In Edelman v. Jordan.

Amicus' brief began its argument, at p.5, with the statement that "apart from the claim of immunity, appellant does not argue with the award as an appropriate exercise of the district court's discretion to fashion an equitable remedy." But the point is that the defendant-Commissioner's claim of immunity under the eleventh amendment, if accepted by the court, is dispositive.

If amicus means to suggest that the district court, notwithstanding the bar of the eleventh amendment, can fashion an equitable remedy which would include the award of attorneys' fees against the State, how then can he answer the following quotation from Edelman, at 39 L.Ed.2d 674-75:

> "We do not read Ex parte Young or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature."

Hall v. Cole, 412 U.S. 1 (1973) and the many other cases cited by amicus at p. 5 of its brief may well support the proposition that a federal court may award attorneys' fees as an

appropriate exercise of its discretion to fashion an equitable remedy. But those were cases in which, as pointed out in Jordan v. Gilligan, supra, the district court had the requisite jurisdiction to make such an award. In those cases, the eleventh amendment was not a jurisdictional bar to the district court's action.

Amicus' brief, at p. 7, states that:

> "...the Edelman court recognized that many forms of equitable relief have great impact on state treasuries, and went on to say that "such an ancillary effect is a permissible and often inevitable consequence of the principle announced in Ex parte Young..."

This statement is a misreading of the Edelman opinion. The Court was not referring to equitable relief when it referred to the "ancillary effect" which "is a permissible and often inevitable consequence of the principle announced in Ex parte Young." It was referring to an order by a federal district court against a State which is limited to prospective injunctive relief. The Eleventh Amendment is no bar to such an order. This becomes clear from a reading of the Edelman opinion.

> "...The injunction issued in Ex parte Young was not totally without effect on the State's revenues, since the state law which the Attorney General was

> enjoined from enforcing provided substantial monetary penalties against the railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in Ex parte Young...[b]ut the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature...: The Supreme Court then went on to say: "[s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra." 39 L.Ed.2d, p.675. [emphasis added]

Thus, the permissible "ancillary effect" referred to in Edelman was narrowly defined as one in which the "fiscal impact" on the state treasury was the necessary result of compliance with decrees which by their terms were prospective in nature.

Amicus' brief contends that, despite this specific language, a much broader meaning should be given to the term "ancillary effect" and that it should include "the normal incidents of a suit properly within the jurisdiction of the federal court." [amicus' brief, p.8]. But a careful reading of Edelman does not support this contention. Indeed, if this were the case it would render largely meaningless the Court's language in Edelman

when it said, supra, that, "We do not read Ex parte Young... to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, as long as the relief may be labeled 'equitable' in nature."

III. Ex Parte Young "Hewed To No Such Line".

Amicus' brief, at p. 9, contends that the award of costs and attorneys' fees against a state are essential to the enforcement of federal rights, and goes on to say that, "The suability of state officers, established by Ex parte Young, is no minor exception to the eleventh amendment; rather, it is a fundamental mechanism for enforcing rights created by the Constitution and implemented by Congress to protect citizens against acts done in the name of their state governments." But as was pointed out in Edelman, the relief awarded in Ex parte Young was prospective only. The Court also stated at a later point in its opinion: "But it has not heretofore been suggested that Section 1983 was intended to create a waiver of the State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself."

The Edelman decision does not abolish Section 1983 actions. Nor does it prevent state officers from being accountable for their actions impairing a citizen's fourteenth amendment rights. As Justice Douglas stated in his dissenting opinion in Edelman:

> "In Ex parte Young, 209 U.S. 123, a suit by stockholders of a railroad was brought in a federal court against state officials to enjoin the imposition of confiscatory rates on the railroad

in violation of the Fourteenth Amendment.

"The Eleventh Amendment was interposed as a defense. The Court rejected the defense saying that state officials with authority to enforce state laws - "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." Id., at 156. The Court went on to say that a state official seeking to enforce in the name of a State an unconstitutional act "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." Id., at 159-160.

IV. Are Costs "Unquestionably Available Against States And State Officials"?

Amicus curiae states in his brief that "contrary to appellants' claims, the amenability of states and state officials to taxation of costs is settled, in the Supreme Court [citing] Fairmount Creamery v. Minnesota, 275 U.S. 70, (1927)..."

In Fairmount Creamery, the Supreme Court based its action in taxing costs against a state on what

> "...the invariable practice has been against a state in both civil and criminal cases to adjudge costs against it, under the Rule which is now Section 3, Rule 29, of our present Rules. That rule in different forms, and under a different number, has been in force since the February term, 1810. Dewhurst, Rules of Practice in U.S. Courts, 2d ed. 153. It has been in its present form since the January term, 1858. See St. Louis & S. F. R. Co. v. Spiller, 275 U.S. 156, post, 209, 48 Sup. Ct. Rep. 96. We think that the rule construed by long practice justifies us in treating the state just as any other litigant and in imposing costs upon it as such, without regard to the inferences sought to be drawn from United States ex rel. Phillips v. Gaines, supra.
>
> "If specific statutory authority is needed,

it is found in Section 254 of the Judicial Code, which first appeared in the Act of March 3, 1877, chap. 105, 19 Stat. at L. 344, and was re-enacted March 3, 1911, chap. 231, 36 Stat. at L. 1087, 1160, U. S. C. title 28, Section 352. It provides that there shall be "taxed against the losing party in each and every cause pending in the Supreme Court" the cost of printing the record, except when the judgment is against the United States. This exception of the United States in the section with its emphatic inclusion of every other litigant shows that a state as litigant must pay the costs of printing, if it loses, in every case, civil or criminal. These costs constitute a large part of all the costs. The section certainly constitutes pro tanto statutory authority to impose costs generally against a state if defeated."

Thus the Fairmount Creamery case shows the basis of the practice of taxing costs against a state to be based on long practice and Congressional statutory authority. But Edelman states that a state's immunity is based on constitutional authority dating back to 1798 when the eleventh amendment was adopted.

Congress has no power to withdraw eleventh amendment immunity from the States. That requires a constitutional amendment. Therefore, under the holding in Edelman, a federal court

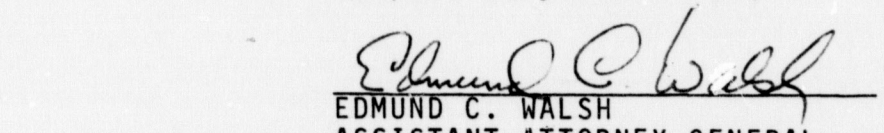
has no power to award costs, as well as attorneys' fees, against a state, absent a waiver of its eleventh amendment immunity.

And this same rationale applies to "recent federal legislation authorizing attorneys' fees against the states and state officials" to which amicus curiae refers in his brief when referring to the Emergency School Aid Act of 1972 and to Title VII of the Civil Rights Act of 1964. Congress simply does not have the power to enact legislation which would deprive the States of the immunity which they possess under the Eleventh Amendment, as announced in Edelman v. Jordan, supra.

## CONCLUSION

For the foregoing reasons, the orders of the district court contained in its Ruling on Plaintiffs' Motion for Contempt and Other Relief, in which the district court awarded attorneys' fees to plaintiffs' counsel and costs against the defendant-Commissioner of Welfare, should be set aside.

Respectfully submitted,



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I hereby certify that on the 11th day of September, 1974, I served a copy of the foregoing Reply Brief of Defendant-Appellant to Brief of Amicus Curiae by depositing it in the mails to the following:

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